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V.G., Appellant)	
)	
and)	Docket No. 19-1728
)	Issued: September 2, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Philadelphia, PA, Employer)	
)	

Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 15, 2019 appellant, through counsel, filed a timely appeal from a March 6, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the March 6, 2019 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 29, 2001 appellant, then a 51-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained a back injury as a result of her repetitive employment duties, including heavy lifting, pushing, and pulling equipment. She noted that she first became aware of her condition and first realized its relation to her federal employment on October 21, 1997. Appellant continued to work modified duty. OWCP accepted her claim for right carpal tunnel syndrome.⁵

In a December 8, 2014 letter, appellant, through counsel, requested that a schedule award be issued based on the impairment rating report of Dr. Nicholas Diamond, an osteopath specializing in family medicine. In a report dated July 1, 2014 and updated on December 5, 2014, Dr. Diamond noted a date of maximum medical improvement (MMI) of July 1, 2014. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁶ he determined that appellant had a combined total of 20 percent right upper extremity permanent impairment.⁷

In a June 2, 2015 report, Dr. Arnold Berman, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), disagreed with Dr. Diamond's December 5, 2014 impairment rating report. He concluded that, according to Table 15-23 of the A.M.A., *Guides*, appellant had zero percent right upper extremity permanent impairment due to her accepted right carpal tunnel syndrome.

On November 6, 2015 appellant filed a claim for a schedule award (Form CA-7).

OWCP subsequently developed the evidence of record. By decision dated March 10, 2016, it denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due

⁴ Docket No. 11-1556 (issued January 13, 2012); Docket No. 17-1341 (issued July 16, 2018).

⁵ Although appellant filed an occupational disease claim for an alleged back injury, she submitted various medical reports which described treatment for left shoulder bursitis, left brachial plexopathy, left carpal and cubital tunnel syndrome, right carpal tunnel syndrome, cervicothoracic strain, and lumbar pain.

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ Dr. Diamond determined that appellant had 13 percent permanent impairment under Table 15-7 for sensory deficit of the right brachial plexus, 7 percent permanent impairment under Table 15-34 for range of motion deficit of the right shoulder, and 1 percent permanent impairment under Table 15-21 for class 1 sensory deficit of the right radial nerve below the elbow.

to her accepted right carpal tunnel syndrome. By decision dated August 8, 2016, a representative of OWCP's Branch of Hearings and Review affirmed the March 10, 2016 decision.

On November 14, 2016 appellant, through counsel, requested reconsideration and submitted a January 13, 2017 addendum report by Dr. Diamond. Dr. Diamond determined that, according to Table 15-23 of the A.M.A., *Guides*, appellant had six percent right upper extremity permanent impairment due to her accepted right carpal tunnel syndrome. By decision dated February 10, 2017, OWCP denied modification of the August 8, 2016 decision.

Appellant appealed to the Board. By decision dated July 16, 2018, the Board set aside the February 10, 2017 decision due to an unresolved conflict in the medical opinion evidence between Dr. Diamond, appellant's treating physician, and Dr. Berman, the DMA, regarding whether appellant had established permanent impairment of a scheduled member or function of the body due to her accepted right upper extremity condition, warranting a schedule award. It remanded the case to OWCP for referral to an impartial medical examiner for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).

OWCP subsequently referred appellant's claim, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict in medical evidence. In a January 30, 2019 report, Dr. Didizian discussed her history of injury, including the SOAF, and noted that her claim was accepted for right carpal tunnel syndrome. He reviewed appellant's medical records and indicated that an August 7, 2013 electromyography and nerve conduction velocity (EMG/NCV) study⁸ showed no evidence of carpal tunnel syndrome. Upon physical examination of the elbow, Dr. Didizian observed negative Tinel's sign at the cubital and radial tunnels. He reported that examination of appellant's right wrist demonstrated that Tinel's testing did not extend to the radial digits, only to the long finger and compression test was also negative for any radial digit involvement. Dr. Didizian concluded that there were no clinical findings of her accepted right carpal tunnel injury. Utilizing Table 15-23: *Entrapment/Compression Neuropathy Impairment*, page 449, he noted grade modifiers of 0 for test findings and history due to a normal EMG. Dr. Didizian also reported that appellant's physical findings were normal. He determined that she had zero percent permanent impairment of both the right and left upper extremities. Dr. Didizian noted that appellant had reached MMI on July 1, 2014 which was the date of Dr. Diamond's impairment rating.

Appellant also submitted reports dated August 16, 2018 to February 26, 2019 by Dr. Scott M. Fried, a hand surgeon. Dr. Fried recounted her complaints of continued right carpal tunnel symptoms. He reported that neurological examination of appellant's upper extremities revealed positive Tinel's and compression testing of the radial nerve at the right elbow. Dr. Fried diagnosed right radial neuropathy, right brachial plexopathy/cervical radiculopathy, and bilateral carpal tunnel median neuropathy.

By decision dated March 6, 2019, OWCP again denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of

⁸ An August 7, 2013 EMG/NCV study demonstrated normal test findings except for moderate right upper brachial plexus level nerve compromise, moderate left ulnar nerve compromise, and right posterior interosseous nerve compromise at the radial tunnel level.

a scheduled member or function of the body due to her accepted right carpal tunnel syndrome. It noted that the special weight of the medical evidence rested with Dr. Didizian, serving as the impartial medical examiner, who found, in his January 30, 2019 report, that she did not have any right upper extremity permanent impairment due to her accepted right carpal tunnel injury.

LEGAL PRECEDENT

The schedule award provisions of FECA⁹ and its implementing regulations¹⁰ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.¹¹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.¹²

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must identify the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).¹³ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁴ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids, and calculations of modifier scores.¹⁵

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.¹⁶ In Table 15-23, grade modifiers levels (ranging from 0 to 4) are described for the categories Test Findings, History, and Physical Findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down based on functional scale, an assessment of impact on daily living activities.¹⁷

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall

⁹ 5 U.S.C. § 8107.

¹⁰ 20 C.F.R. § 10.404.

¹¹ *Id.* at § 10.404 (a); *see also* Jacqueline S. Harris, 54 ECAB 139 (2002).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.6.6a (January 2010); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

¹³ A.M.A., *Guides* 383-492; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

¹⁴ *Id.* at 411.

¹⁵ *See R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹⁶ A.M.A., *Guides* at 449.

¹⁷ *Id.* at 448-49.

appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹⁸ This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁹ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.²⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

The Board had previously determined that there was a conflict in the medical opinion evidence between Dr. Diamond, appellant's treating physician, and Dr. Berman, an OWCP referral physician, on the issue of whether appellant had permanent impairment of a scheduled member due to her accepted right carpal tunnel syndrome. In order to resolve the conflict, OWCP properly referred her to Dr. Didizian, along with the medical record and SOAF, for an impartial medical examination. In a January 30, 2019 report, Dr. Didizian provided examination findings and reported that there were no clinical findings of appellant's accepted right carpal tunnel injury. He referenced Table 15-23, *Entrapment/Compression Neuropathy Impairment*, page 449, and noted a grade modifier of 0 for test findings and history due to normal EMGs. Dr. Didizian also reported that appellant's physical findings were normal. He opined that she had zero percent permanent impairment of both the right and left upper extremities.

As noted above, when a case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.²¹ The Board finds that Dr. Didizian's January 30, 2019 report is entitled to special weight and established that appellant had no right upper extremity permanent impairment.²² Dr. Didizian's opinion was based on a proper factual and medical history, which he reviewed, and on the appropriate tables and grading schemes of the A.M.A., *Guides*. He referenced Table 15-23 and explained that appellant had no right upper extremity permanent impairment due to normal examination findings and normal EMG. Accordingly, OWCP properly accorded determinative weight to Dr. Didizian's January 30, 2019 report.²³

¹⁸ 5 U.S.C. § 8123(a); see *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹⁹ 20 C.F.R. § 10.321.

²⁰ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

²¹ *Id.*

²² See *H.K.*, Docket No. 18-0528 (issued November 1, 2019); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

²³ See *D.S.*, Docket No. 18-0336 (issued May 29, 2019); *T.C.*, Docket No. 17-1741 (issued October 9, 2018).

Appellant also submitted reports dated August 16, 2018 to February 26, 2019 by Dr. Fried. These reports, however, are insufficient to overcome the special weight afforded to Dr. Didizian as Dr. Fried did not reach any conclusion with regard to permanent impairment.²⁴

On appeal counsel asserts that Dr. Didizian's January 30, 2019 report was not based upon the SOAF or the medical evidence in file and, therefore, cannot carry the special weight of the medical evidence. As explained above, however, Dr. Didizian's opinion was in fact based on a proper factual and medical history and, accordingly, OWCP properly accorded the special weight of the medical evidence to his impairment rating. As appellant has not provided a rationalized medical opinion to dispute Dr. Didizian's impairment rating, the Board finds that she has not established a permanent impairment of her right upper extremity due to her accepted right carpal tunnel injury. Accordingly, she has not met her burden of proof to establish that she is entitled to a schedule award.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member, due to her accepted right carpal tunnel syndrome, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 2, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

²⁴ 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris, supra* note 11.